RECENT DECISIONS

Who is liable for an injury sustained during a fundraising event?

Crowley v Pybar Mining Services Pty Ltd [2017] NSWWCCPD 10 (29 March 2017)

Link to decision

Summary

The determination of the appeal in *Crowley* explored the liability of the employer, where a worker sustained an injury during a fundraising event. The key considerations included whether the employer or the host employer had organised the event, whether there was 'encouragement, authorisation or inducement' by the employer or the host employer for the worker to attend, and whether silence could equate to 'implied inducement'.

During the initial proceedings, the Arbitrator found that the worker did not suffer an injury in the course of his employment, within the definition of section 4 of the *Workers Compensation Act 1987* (the 1987 Act). The worker appealed from the decision slightly out of time, challenging the Arbitrator's finding of fact.

DP Roche rejected all grounds of appeal, and refused the worker's application to extend the time for making an appeal. The critical factors considered included the following:

- The event was not organised by the respondent.
- The event was not organised by the host employer.
- The event was voluntarily organised by the workers.
- There was no 'encouragement, authorisation or inducement' by the respondent for the worker to attend the event.
- The worker was not rostered to work on the day of the event.
- Any mention of the event during meetings by the host employer were simply reminders of the event to raise money for charity.
- Silence by the respondent during meetings mentioning the event did not equate to 'implied inducement'.
- There was no evidence that the worker had attended the event with the belief that it would be a bonding experience, promoting an 'esprit de corps'.

Background

The worker was employed by Pybar Mining Services Pty Ltd (the respondent), who was contracted to provide labour to Newcrest Mining (Newcrest). The worker was a part of a team comprising employees from both the respondent and Newcrest.

The employees of Newcrest organised a fundraising evening to be held on 6 March 2015, which involved a rugby league game. The event was mentioned by the manager of Newcrest during meetings held in the presence of a manager employed by the respondent.

The worker took part in the rugby league game, during which he sustained injuries to his right leg for which he required surgery. The worker subsequently lodged a claim for workers compensation, alleging that the injury was sustained in the course of his employment with the respondent.

The respondent's insurer issued a section 74 notice, declining liability for the worker's injury, relying on sections 4 and 9A of the 1987 Act.

Arbitral Decision

The Arbitrator identified the issue as being whether the injury was sustained in the course of employment[1], pursuant to section 4 of the 1987 Act.

The Arbitrator observed that based on relevant authorities, the worker must have been doing something 'reasonably required, expected or authorised in order to carry out his actual duties'[2], or the employer expressly or impliedly 'induced or encouraged the employee to spend that interval or interlude at a particular place in a particular way'.[3]

The Arbitrator stated that there was no evidence of the respondent inducing or encouraging the worker to participate in the rugby league game, and noted that there was no benefit to the worker in attending the game. In response to the worker's submission that a manager from the respondent attended meetings and did nothing to oppose the worker's attendance in the rugby league game, the Arbitrator stated that this did not equate to 'an implied encouragement, authorisation or inducement.'

The Arbitrator found in favour of the respondent.

Appeal decision

The worker appealed the decision arguing that the Arbitrator had erred in finding[4] as follows:

1. that there was no encouragement by the respondent for the worker to participate in the game (relying on *Nationwide News Pty Ltd v Naidu; ISS Security Pty Ltd v Naidu* [2007] NSWCA 377 (*Naidu*));
2. that there was no evidence that any employee of the respondent was organising the game;
3. that there was no evidence that the worker wished to participate in the game as a bonding experience;
4. that the manager from the respondent in staying silent, did not engage in 'authorisation, encouragement or inducement' of participation in the game.

The appeal was filed four days out of time. The appellant worker submitted that the appeal was made out of time due to a delay in obtaining an ILARS grant, which DP Snell found to constitute 'exceptional circumstances'[5] but prior to allowing an extension of time to appeal but went on to consider whether the appeal had reasonable prospects of success.

DP Snell found that all four grounds of appeal must fail, and therefore concluded that the appeal did not have reasonable prospects of success. As a result, the appellant's application to extend the time for making an appeal was refused.

DP Snell at [53] noted that the appellant may be seeking to refer to the concept raised in Naidu of vicarious liability in 'a 'host employer' arrangement, where a supervisor employed by the host employer effectively became the employer's supervisor of the plaintiff.' However, DP Snell stated that the appellant did not raise this argument at the arbitration hearing, and therefore, it could not be permitted to be raised on appeal.[6] However, it is noted that DP Snell found that the event was not organised by the host employer, and therefore, an argument of vicarious liability may not have been successful in any event.

Implications

In determining the liability of an employer regarding a worker's injury sustained during a fundraising event, the factual circumstances surrounding the fundraising event must be considered. A factual investigation should address all circumstances surrounding the event, including who organised the event, when the event took place, whether the worker was rostered on to work on the day of the event, whether there was any encouragement by the employer for the worker to attend the event, whether there was any work benefit in the worker attending the event, whether the employer contributed to the organisation of the event, and whether there was financial contribution by the employer. A mere mentioning and reminder of an event during work meetings, or silence during discussions of the event may not constitute encouragement or inducement by an employer.

Furthermore, although not specifically argued by the worker, the case suggests that an employer may become vicariously liable for the actions of a supervisor employed by a 'host employer'. Therefore, if it was found that the supervisors of the host employer organised the fundraising event and encouraged the worker's attendance, the respondent may have become liable for the worker's injury.

[1] V Van Haeften v Caltex Oil (Australia) Pty Ltd (1995) 12 NSWCCR 250, Clark v Commissioner of Police [2002] NSWCC 40; (2004) 1 DDCR 193.

[2] Humphrey Earl Ltd v Speechley [1951] HCA 75; [1951] HCA 75; 84 CLR 126, Henderson v Commissioner of Railways (WA) [1937] HCA 67; 58 CLR 281, Roncevich v Repatriation Commission [2005] HCA 40; 222 CLR 115, 218 ALR 733; 79 ALJR 1366, Hatzimanolis v ANI Corporation Ltd [1992] HCA 21; 173 CLR 473; 106 ALR 611; 66 ALJR 365.

[3] Comcare v PVYW [2013] HCA 41; 250 CLR 246; 303 ALR 1, Haider v JP Morgan Holdings Aust Ltd t/as JP Morgan Operations Australia Ltd [2007] NSWCA 158; 4 DDCR 634.

[4] Section 352 of the Workers Compensation and Injury Management Act 1998.

[5] Pt 16 f 16.2(12) of the Workers Compensation Commission Rules 2011.

[6] Metwally v University of Wollongong [1985] HCA 28 at [7].

For more information, please contact:

Robbie Elder
Senior Associate
T: 02 8257 5766
M: 0418 970 181
robbie.elder@turkslegal.com.au

Irene Youn
Lawyer